

Hon. Timothy W Dore
In Proceedings Under
Chapter 7
Hearing Date: January 6, 2017
Time: 9:30 AM
Response Date: December 30, 2016
Location: 700 Stewart Street, Seattle,
WA 98101
Room: 8106

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

In re

Scott Banchemo,

Debtor(s),

Case No: 11-12340 TWD

REPLY TO TRUSTEE'S RESPONSE TO
MOTION SEEKING RELIEF FROM STAY
AND COMPEL ABANDONMENT OF
REAL PROPERTY AND JOINDER TO
SAME

REPLY

Mel Foster and Virginia Foster, ("Fosters"), hereby reply to the Trustee's observations and the joinder by the debtor's first cousin, Michael Yerkovich.

I. Resolution During Chapter 11 Closure Allowed

The Fosters have been trying to resolve issues related to their agreement with Mr. Banchemo for a very long time. As mentioned in the motion at bar, the Fosters attempted to resolve issues surrounding their agreement with the Debtor by requesting this court's intervention a year ago. Their motion was denied with the Court stating in its December 23, 2015 Order under ECF No 233, pg 3, lines 8 – 11.

REPLY TO TRUSTEE'S RESPONSE TO MOTION
FOR RELIEF FROM STAY AND COMPEL
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JOINDER THEREIN 1

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1 ... The Court did not specifically retain jurisdiction to interpret the Joint Venture
2 Agreement or any disputes between the Debtor and the Fosters. To the extent the Court
retained jurisdiction to deal with certain issues post-confirmation, it retained jurisdiction
only “until the proceedings... closed...” on July 25, 2012.

3 This Court went to tell the Fosters in lines 17 - 20:

4 ...The Confirmed Plan does not preclude the Fosters from filing an action in state court to
5 enforce the Joint Venture Agreement or the Amendment. The Fosters are free to file any
action they wish to enforce the Joint Venture Agreement or the Amendment, but they must
do so in state court....

6 In this case, the Fosters did move forward to resolve the matter with Scott outside of the
7 bankruptcy court.

8 **II. Equitable Title vs Legal Title**

9 The facts and agreements between Debtor, Scott Banchemo and the Fosters comprise as
10 a whole, a conveyance of equitable title. The Debtor and Fosters, by amending the Joint
11 Venture, essentially created an option to purchase the property exercisable by either party. In
12 resolving their dispute, the parties agreed that if the Fosters tendered the \$9,250.00, Scott
13 would convey his interest in the property to the Fosters. Debtors performed and tendered the
14 \$9,250.00 which was accepted by the Debtor’s Power of Attorney who executed the Quit
15 Claim Deed, providing a copy of same to the Fosters. This occurred nearly a year prior to the
reopening of the case and appointment of a Trustee. While there are issues regarding legal
title, the world was put on notice when the Fosters filed their notice of equitable title interest in
the property with the King County Recorder prior to the case reopening.

16 Equitable title, while old law, is still very much alive. In *Crowley v. Bryne*, 71 Wash.
17 444, (1912) the Washington State Supreme Court noted that there are cases where, “[T]he
18 grant, on a valuable consideration, of an option to purchase, constitutes the grantee the
equitable owner of an interest in the property.” *Id.* at 449. The Court in that case goes on to

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1 find that, “[a] subsequent purchaser with notice of a valid and irrevocable option would
2 certainly take subject to the right of the option holder to complete his purchase.’ *Id.* at 449-450.

3 In *Spokane School Dist. No. 81 v. Parzybok*, 96 Wash.2d 95 (1981), the court asserts:

4 An option to purchase is a contract whereby the owner of the property, for valuable
5 consideration, sells to the optionee the right to buy the property within the time, for the
6 price, and upon the terms and conditions specified in the option, but which in itself
7 imposes no obligation on the purchaser to acquire the property. *Hopkins v. Barlin*, 31
8 Wn.2d 260, 196 P.2d 347 (1948); *Crowley v. Byrne*, 71 Wash. 444, 129 P. 113 (1912).
A subsequent owner, having notice of the option, takes subject to the optionee's right to
complete his purchase. *Crowley v. Byrne*, *supra*. It was held in that case that, as
between the optionee and a subsequent purchaser who had notice of the option right,
the optionee had an interest in the land binding upon the purchaser, even though the
optionee had not exercised his option or paid any part of the purchase price.

9 *Id.* at 96, 97.

10 While the original title did not pass to the Fosters, in *Finch v. Matthews*, 74 Wn.2d 161,
11 166 (1968), the Washington Supreme Court affirmed that, “[t]he superior title whether legal or
12 equitable must prevail. *Rue v. Oregon & Washington R.R.*, 109 Wash. 436, 186 Pac. 1074
13 (1920); RCW 7.28.120. “ This follows the reasoning in *Crowley* wherein the court found that
14 the holder of an option to purchase real property, who has fully executed the purchase price,
although receiving no deed therefore, becomes vested with equitable title to the land, such title
relating back to the date of the option. *Crowley supra*, at 448, 449.

15 Here, unless the trustee can avoid the agreement to sell, the Trustee would have no
16 more rights than a subsequent owner having notice of the option. Here it cannot be said that
17 there was a fraudulent transfer. The parties have been negotiating, arguing, and attempting to
18 resolve the issues of unequal contribution by Banchemo. The option to purchase in the amended
Joint Venture was symmetrical. Either party could exercise the option. Ultimately a price was
agreed upon and the sale was made.

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1 Equitable title interest in the property was conveyed to the Debtors over a year ago.
2 The debtor-in-possession, under the powers vested to the debtor, settled and sold the property
3 to the Fosters. While specific performance is still needed to require the production of the
4 original QCD, or a decree of quiet title is needed to settle legal title issues (hence the relief
5 from stay requested), the Trustee cannot assume a bona fide purchaser status in this matter and
6 any rights that the Trustee would have are the same as the Debtor's.

7 **III. Value of the Property**

8 The present value of the property is only of issue if the property is still a part of the
9 estate and only if the Trustee has more of an interest in the property than the Debtor. If the
10 Trustee is found to have superior title interest, Fosters dispute the CMA value presented in the
11 Trustee's Response. The CMA is not an appraisal by a certified appraiser. It does not take into
12 consideration the current condition of the home. If called to testify the Fosters would point out
13 that there are deferred maintenance issues that affect the value of the property and that the cost
14 of sale itself would consume at least 8% of the value of the property. The Fosters would also
15 testify that:

- 16 • Fosters made the entire down payment
- 17 • Fosters made all of the mortgage payments
- 18 • Fosters paid for all maintenance and improvements
- 19 • For those maintenance and improvements not hired out, Fosters performed those
20 maintenance and improvement activities.
- 21 • Banchemo paid nothing towards the down payment
- 22 • Banchemo didn't make a single mortgage payment
- 23 • Banchemo didn't pay for any of the maintenance or improvements
- Banchemo didn't perform any of the maintenance or contribute in helping make
improvements.

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1 Further, the Fosters, because of the unequal contributions between the parties and
2 contributions made while in the Chapter 11, would have a substantial Administrative claim for
3 contributions made on behalf of the debtor-in-possession which directly and substantially
benefited the estate should their claim to equitable title be deemed to fail.

4 IV. CONCLUSION

5 THEREFORE, for at least these reasons, Mel Foster and his wife Virginia Foster
6 respectfully renew their request that this Court enter an order terminating the automatic stay
7 pursuant to 11 U.S.C. § 362 and that the Creditor be allowed to immediately proceed with
8 pursuing with any and all contractual and statutory remedies necessary to enforce the Quit
9 Claim Deed referenced herein against the property located at 913 23rd Ave. S., Seattle,
Washington. Similarly, the Court should grant Fosters' motion to Compel Abandonment of the
same property.

10 DATED: January 2, 2017

11 /s/ Mark C McClure

Mark C. McClure, WSBA # 24393

Attorney for Mel Foster and Virginia Foster

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DECLARATION OF SERVICE

I, the undersigned, hereby declare under penalty of perjury under the laws of the State of Washington that on this day I caused to be delivered a true and correct copy of the foregoing document to the following:

PARTY / COUNSEL	DELIVERY METHOD
COUNSEL FOR CHAPTER 7 TRUSTEE Rory C. Livesey, Esq. THE LIVESEY LAW FIRM 600 STEWART STREET, Suite 1908 Seattle, WA 9801	<input type="checkbox"/> U.S. Mail, 1 st Class Postage <input type="checkbox"/> U.S. Mail, Certified, Return Receipt <input type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Other: ECF
CHAPTER 7 TRUSTEE Nancy L James 15008 - 63rd Drive SE Snohomish, WA 98290	<input type="checkbox"/> U.S. Mail, 1 st Class Postage <input type="checkbox"/> U.S. Mail, Certified, Return Receipt <input type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Other: ECF
COUNSEL FOR MICHAEL YERKOVICH David T. Lyons, Esq. Lyons Sullivan 10655 NE 4th, Ste 704 Bellevue, wA 98004	<input type="checkbox"/> U.S. Mail, 1 st Class Postage <input type="checkbox"/> U.S. Mail, Certified, Return Receipt <input type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> Other: ECF

DATED: January 02, 2017

At Kent, Washington

/s/ Mark C. McClure

Mark C. McClure

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